



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Insituform East, Inc.

**File:** B-248954

**Date:** September 15, 1992

Michael J. Hogan, Esq., Witte, Lestz & Hogan, P.C., for the protester.

Vera Meza, Esq., and David Scott, Esq., Department of the Army, for the agency.

Behn Miller, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that agency (1) improperly waived a solicitation specification for the awardee, and (2) determined the awardee to be responsible in bad faith is dismissed as untimely where not filed within 10 working days of decision denying protester's agency-level protest challenging awardee's eligibility for award.

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### DECISION

Insituform East, Inc. protests the award of a contract to U-Liners Contracting Company, Inc., under invitation for bids (IFB) No. DAAD05-92-B-0063, issued by the Department of the Army for the cleaning and rehabilitation of sewers and storm drain pipes at Aberdeen Proving Ground, Maryland. As provided in the solicitation, this work is to be performed in accordance with American Society Testing Manual (ASTM) standard F-1216,<sup>1</sup> which describes a patented cured in place pipe (CIPP) inversion process. In its protest, Insituform--who is a licensee of one of the CIPP inversion patent

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<sup>1</sup>ASTM F-1216 is entitled "Standard Practice for Rehabilitation of Existing Pipelines and Conduits by the Inversion and Curing of a Resin-Impregnated Tube." This standard describes a CIPP rehabilitation procedure whereby a resin-impregnated, flexible tube is inverted into a pipe through the use of water or air pressure; this method imitates the physical process by which a sock is turned inside out. Once installed, the resin liner is then inflated until it becomes sealed to the walls of the pipe, thereby repairing cracks or other structural defects.

holders--claims that the agency intends to improperly waive this requirement for the awardee since U-Liners is not licensed to use this process. Alternatively, Insituform argues that the agency's affirmative determination of the awardee's responsibility was made in bad faith.

We dismiss the protest.

The solicitation was issued on February 6, 1992, and contemplated the award of a firm, fixed-price, indefinite quantity contract for a base year and 2 option years. The IFB contained a separate pricing schedule for each contract year which set forth individual contract line items for each size of sewer pipe requiring repair. As their bids, bidders were required to complete and submit these three pricing schedules; no other submissions were required. With regard to contract award, the IFB provided that the government would evaluate bids for award by adding the total price for the base requirement to the total price for all options.

At the March 30 bid opening, the agency received three bids; the results were as follows:

Insituform	\$3,936,454
Spiniello	3,422,256
U-Liners	3,097,543

By letter dated April 3, Insituform filed a protest<sup>2</sup> with the contracting officer, arguing that the bids submitted by Spiniello and U-Liners were "technically nonresponsive and therefore ineligible for consideration for award" since the pipeline rehabilitation processes used by these firms do not comply with ASTM F-1216. With its protest, Insituform submitted "technical information" which demonstrated that Insituform was the only bidder licensed to use one of two inversion methods specified in ASTM F-1216.<sup>3</sup>

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<sup>2</sup>Even though the correspondence was not specifically identified as such, we consider Insituform's April 3 letter to be an agency-level protest since the letter constitutes a "written objection by an interested party to a proposed award" of a contract to any bidder other than Insituform. See Federal Acquisition Regulation § 33.101.

<sup>3</sup>Specifically, Insituform submitted a copy of ASTM F-1216; a 1991 United States Environmental Protection Agency handbook describing the various pipeline rehabilitation techniques used by each of the three bidders; and a copy of Spiniello's pipeline rehabilitation brochure.

By letter dated April 15, the contracting officer responded to Insituform's agency-level protest. With regard to the acceptability of U-Liners, the contracting officer stated:

"At this time there is no indication that the apparent low bidder . . . is unable to comply with the [CIPP inversion method] specification. After contract award, the contractor is required to submit his submittals for approval. It is at this time the determination is made as to whether the contractor is in full compliance with the specifications established in the solicitation."

On May 28, the contracting officer made award to U-Liners. On June 2, Insituform apparently contacted the contracting officer to discuss the award; on June 5, Insituform filed this protest with our Office. As explained below, we find the protest to be untimely.

Under our Bid Protest Regulations, when a protest has been initially filed with a contracting activity, any subsequent protest to the General Accounting Office, to be considered timely, must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the agency-level protest. See 4 C.F.R. § 21.2(a)(3) (1992). Initial adverse agency action is the first action, or inaction, taken by an agency that is prejudicial to the position taken in a protest at that level. See 4 C.F.R. § 21.0(f); Building Automation Servs., Inc., B-247891, June 5, 1992, 92-1 CPD ¶ 494.

For purposes of calculating timeliness, absent evidence to the contrary, we assume that mail is received within 1 calendar week from the date it is sent; accordingly, in this case we conclude that the protester received a copy of the contracting officer's April 15 correspondence by April 22. Crowley Caribbean Transport, B-246784, Mar. 31, 1992, 92-1 CPD ¶ 323. The contracting officer's April 15 correspondence advised the protester that the Army intended to make award to U-Liners as the low bidder; accordingly, to be timely, any subsequent challenge to this award should have been filed within 10 working days of April 22. Since Insituform's protest to this Office was not filed until June 5--almost 1 month after the May 6 expiration of the 10-day filing deadline--its protest is untimely. See Electronic Assistance Corp.--Recon., B-248886.2, June 19, 1992, 92-1 CPD ¶ 536.

In its comments on the agency report, Insituform argues that its protest to this Office was timely filed since the "at this time" phrase in the contracting officer's letter indicates that the letter was an intermediate rather than final

agency response regarding U-Liner's compliance with ASTM F-1216. In this regard, Insituform contends that because the contracting officer's letter did not more specifically advise the protester that the information provided in Insituform's agency-level protest would be ignored by the contracting officer in making the responsibility determination of U-Liners, or that the contracting agency intended (in the protester's view) to waive strict compliance with ASTM F-1216 by making award to U-Liners, its protest is timely since it was filed within 10 days of the actual May 28 award date.<sup>4</sup>

The contracting officer's April 15 letter clearly placed Insituform on notice that its arguments regarding U-Liners's alleged noncompliance with ASTM F-1216 had been rejected, that the agency had decided to proceed with award, and that the determination regarding whether U-Liners actually does comply with the solicitation specifications would be made after award. Accordingly, we find that the April 15 letter constituted initial adverse action on Insituform's agency-level protest. See General Hone Corp., B-242357.2, Mar. 22, 1991, 91-1 CPD ¶ 322. Any continuing objections the protester had to award to U-Liners based on its alleged inability to comply with the specifications thus should have been

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<sup>4</sup>In advancing this timeliness argument, Insituform has apparently and incorrectly assumed that the issue of a bidder's compliance with ASTM F-1216 involves both a matter of bid responsiveness and responsibility. While this solicitation did provide that "all proposed methods of rehabilitation shall be in strict accordance with ASTM F-1216," the IFB did not require a bidder to address this requirement in its bid or otherwise demonstrate its compliance with this standard as a precondition for award; in fact, no technical submissions were required--and, as noted above, the only evaluation factor for award was price. Accordingly, contrary to Insituform's assumption, the provision requiring compliance with ASTM F-1216 is a general performance specification, and is therefore a matter to be considered by the contracting officer only with regard to making his determination of a particular bidder's responsibility. See Honolulu Marine, B-248380, Aug. 6, 1992, 92-2 CPD ¶ \_\_\_\_; Symtron Sys., Inc., B-242244, Mar. 13, 1991, 91-1 CPD ¶ 282.

filed within 10 days after receipt of the April 15 letter;  
since they were not, the protest is untimely.

The protest is dismissed.

*Christine S. Melody*  
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